

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JAMES B.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

Case No. C19-1298 TLF

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of his June 8, 2016 application for supplemental security income benefits.<sup>1</sup> The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13.

Plaintiff alleged a disability onset date of July 1, 1995. AR 28. The ALJ found that plaintiff had severe impairments of posttraumatic stress disorder, depressive disorder, opiate use disorder in early remission, alcohol use disorder in early remission, and right hand arthritis. AR 16. But the ALJ found (at step five of the sequential evaluation) that plaintiff was not disabled. AR 27-28.

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<sup>1</sup> Plaintiff also filed an application for disability insurance benefits, but that application is not before the Court, since plaintiff amended his alleged disability onset date to June 8, 2016 -- after his date last insured. See AR 13; Pl. Op. Br. (Dkt. # 10) at 1 n.1.

I. ISSUES FOR REVIEW

1. Whether the ALJ harmfully erred in rejecting plaintiff's testimony.

2. Whether the ALJ harmfully erred in rejecting the opinions of examining psychologists William Wilkinson, Ed.D., Richard Washburn, Ph.D., and David Widlan, Ph.D.

II. DISCUSSION

The Court will uphold an ALJ's decision unless: (1) the decision is based on legal error, or (2) the decision is not supported by substantial evidence. *Ford v. Saul*, 950 F.3d 1141, 1153–54 (9th Cir. 2020) (citing *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008)). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). This requires “more than a mere scintilla,” of evidence. *Id.* The Court must consider the administrative record as a whole. *Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014). It must weigh both the evidence that supports, and evidence that does not support, the ALJ's conclusion. *Id.*

The Court considers in its review only the reasons the ALJ identified and may not affirm for a different reason. *Id.* at 1010. Furthermore, “[l]ong-standing principles of administrative law require us to review the ALJ's decision based on the reasoning and actual findings offered by the ALJ—not post hoc rationalizations that attempt to intuit what the adjudicator may have been thinking.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225–26 (9th Cir. 2009) (citations omitted).

1 **A. The ALJ Harmfully Erred in Discounting Plaintiff's Testimony**

2 In weighing a plaintiff's testimony, an ALJ must use a two-step process. *Trevizo*  
3 *v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017). First, the ALJ must determine whether  
4 there is objective medical evidence of an underlying impairment that could reasonably  
5 be expected to produce some degree of the alleged symptoms. *Ghanim v. Colvin*, 763  
6 F.3d 1154, 1163 (9th Cir. 2014). If the first step is satisfied and there is no evidence of  
7 malingering, the second step allows the ALJ to reject the claimant's testimony of the  
8 severity of symptoms if the ALJ provides specific findings and clear and convincing  
9 reasons for rejecting the claimant's testimony. *Id.*

10 Plaintiff testified he has pain in his ankle and wrist that prevents him from  
11 working. See AR 49–50, 54, 271, 276. He testified he “probably could” stand and walk  
12 for eight hours in an eight-hour day. AR 50. He testified he could not use his right wrist  
13 at all during an eight-hour day. See AR 50–51, 276. Plaintiff testified he worked at a  
14 warehouse for two days stacking six packs of pop on pallets, but was only able to do it  
15 because he was taking oxycodone. AR 51–52. Plaintiff testified he has trouble  
16 remembering things and focusing due to anxiety. See AR 53–56, 271, 277.

17 The ALJ found plaintiff's medically determinable impairments could cause some  
18 of the symptoms he alleged. AR 19. The ALJ determined, however, that plaintiff's  
19 testimony regarding the severity of his symptoms was “not entirely consistent with the  
20 medical evidence and other evidence in the record.” *Id.* The ALJ determined plaintiff's  
21 testimony was inconsistent with the medical record and undermined by inconsistencies  
22 in his statements. AR 20–21.

1 The ALJ, addressing plaintiff's claims of mental impairment, rejected plaintiff's  
2 testimony because he received little treatment and endorsed only mild symptoms. AR  
3 20. The ALJ erred in reaching these conclusions. First, the Ninth Circuit has "particularly  
4 criticized the use of a lack of treatment to reject mental complaints because mental  
5 illness is notoriously underreported and because 'it is a questionable practice to  
6 chastise one with a mental impairment for the exercise of poor judgment in seeking  
7 rehabilitation.'" *Regennitter v. Comm'r of Soc. Sec. Admin.*, 166 F.3d 1294, 1299–1300  
8 (9th Cir. 1999) (quoting *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996)).

9 Second, the ALJ failed to identify what further mental health treatment plaintiff  
10 would be expected to receive if his symptoms were as severe as alleged. As the ALJ  
11 acknowledged, plaintiff took medication for his mental symptoms throughout the alleged  
12 disability period. See AR 20. And the ALJ has not identified anything in the record  
13 showing plaintiff was advised to seek more frequent counseling. Because an ALJ is not  
14 qualified as a medical expert, they are not allowed to consider medical knowledge that  
15 exists outside the record and make an independent medical exploration and  
16 assessment as to the condition of a claimant. *Day v. Weinberger*, 522 F.2d 1154, 1156  
17 (9<sup>th</sup> Cir. 1975). The ALJ lacked substantial evidence from which to conclude plaintiff  
18 should have had further treatment if his conditions were as severe as alleged.

19 Third, the ALJ did not accurately represent the record when stating plaintiff  
20 reported only mild symptoms. See AR 20. An ALJ "cannot simply pick out a few isolated  
21 instances" of medical health that support his conclusion, but must consider those  
22 instances in the broader context "with an understanding of the patient's overall well-  
23 being and the nature of [his] symptoms." *Attmore v. Colvin*, 827 F.3d 872, 877 (9th Cir.  
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1 2016). Plaintiff endorsed mild mental health symptoms on the one occasion the ALJ  
2 cited. See AR 20, 645–47. But plaintiff endorsed moderate and more substantial  
3 symptoms on multiple other occasions. See, e.g., AR 450, 456, 596, 608, 613, 616,  
4 629, 635–37, 696, 699, 702, 704. The ALJ thus erred in rejecting plaintiff’s allegations of  
5 mental impairment based on his receipt of minimal treatment and endorsement of only  
6 mild symptoms.

7 Addressing plaintiff’s claims of physical impairment, the ALJ rejected plaintiff’s  
8 testimony because he had “not availed himself of [non-narcotic] treatment options  
9 despite being referred to orthopedics on multiple occasions,” and he had been able to  
10 perform some work activity, such as dishwashing and janitor work. AR 20.

11 The ALJ erred in rejecting plaintiff’s claims of physical impairment based on  
12 failure to follow through with non-narcotic treatment. An ALJ may reject a claimant’s  
13 testimony based on failure to seek or comply with treatment -- but must consider any  
14 proffered reasons for not doing so. See *Molina v. Astrue*, 674 F.3d 1104, 1113–14 (9th  
15 Cir. 2012). The ALJ’s primary focus here was on plaintiff’s failure to have surgery on his  
16 wrist. See AR 20. The record shows the plaintiff’s wrist fracture dates back to at least  
17 August 2013. AR 437. Plaintiff went back and forth on whether to have surgery on his  
18 wrist because he was told it would permanently limit mobility in his wrist. See AR 777,  
19 786. The ALJ did not address this, and thus erred in rejecting plaintiff’s claims of wrist  
20 impairment based on failure to follow through with non-narcotic treatment.

21 The ALJ further erred in rejecting plaintiff’s physical symptom testimony based on  
22 his work as a dishwasher and janitor. Although such work could potentially contradict  
23 plaintiff’s testimony, the ALJ did not address the length and type of work plaintiff  
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1 performed, and the record does not contain that information. See AR 45. The ALJ's  
2 determination that plaintiff's testimony was contradicted by his work as a dishwasher  
3 and janitor is thus not supported by substantial evidence in the record, and the ALJ  
4 erred. See *Trevizo*, 871 F.3d at 676 (holding the ALJ erred when rejecting claimant's  
5 testimony based on childcare activities when there was "almost no information in the  
6 record about Trevizo's childcare activities").

7 The ALJ also rejected plaintiff's overall symptom testimony based on  
8 inconsistencies in plaintiff's statements throughout the record. AR 20–21. The  
9 inconsistencies identified are not clear and convincing, however, particularly in light of  
10 plaintiff's mental illness, and the ALJ's other errors in evaluating plaintiff's testimony.  
11 See *Burrell v. Colvin*, 775 F.3d 1133, 1140 (9th Cir. 2014) (holding that "one weak  
12 reason," even if supported by substantial evidence, "is insufficient to meet the 'specific,  
13 clear and convincing' standard" for rejecting a claimant's testimony) (quoting *Molina*,  
14 674 F.3d at 1112). The ALJ identified one inconsistent statement regarding whether  
15 plaintiff attended special education, a fact with marginal relevance to plaintiff's  
16 allegations of impairment. See AR 264. The ALJ noted some discrepancies in plaintiff's  
17 reporting of alcohol and drug use, but none so obvious as to show clear contradiction,  
18 or to cast doubt on the cause of plaintiff's impairments. See AR 561, 580, 639, 699,  
19 714–15, 783, 816, 819–20. The ALJ lastly misstated plaintiff's testimony regarding his  
20 relationship with his fiancée. Plaintiff testified his fiancée had cancer, but he did not  
21 know what kind or what limitations it caused. See AR 39–42. Plaintiff did not testify he  
22 took care of his fiancée, so whether she had cancer, and whether plaintiff knew what  
23 type of cancer it was, is of marginal relevance. See *id.*

1 In sum, the ALJ failed to give clear and convincing reasons for rejecting plaintiff's  
 2 testimony regarding the severity of his mental and physical symptoms. The ALJ  
 3 therefore harmfully erred.

4 **B. The ALJ Partially Erred in Evaluating the Medical Evidence**

5 An ALJ must provide "clear and convincing" reasons for rejecting an examining  
 6 doctor's uncontradicted opinions. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996).  
 7 When the doctor's opinions are contradicted, the ALJ must provide "specific and  
 8 legitimate reasons" for rejecting them. *Id.* at 830–31. The opinions of Dr. Wilkinson, Dr.  
 9 Washburn, and Dr. Widlan are partly contradicted by the opinions of John Gilbert,  
 10 Ph.D., and Carla Van Dam, Ph.D., so the specific and legitimate standard applies. See  
 11 AR 87–88, 107.

12 1. The ALJ Partially Erred in Rejecting Dr. Wilkinson's Opinions

13 a. *The ALJ Reasonably Rejected Dr. Wilkinson's February 2010*  
 14 *Opinions*

15 Dr. Wilkinson first examined plaintiff in February 2010. See AR 595–606. Dr.  
 16 Wilkinson did not review any medical records as part of his evaluation. AR 595. Dr.  
 17 Wilkinson opined plaintiff had mild to moderate limitations in most areas of cognitive and  
 18 social functioning. See AR 598. But he opined plaintiff's limitations would only last three  
 19 months. AR 599.

20 The ALJ gave Dr. Wilkinson's February 2010 opinions little weight. AR 23. The  
 21 ALJ noted Dr. Wilkinson's opinions would only be in effect for three months maximum,  
 22 and vocational training may minimize or eliminate plaintiff's employment barriers. *Id.*  
 23 The ALJ further reasoned these opinions were inconsistent with longitudinal record,  
 24 they were based on only one brief examination, Dr. Wilkinson did not review any  
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1 records prior to offering his opinions, and he was not an expert in Social Security  
2 disability evaluations. See *id.*

3 The ALJ did not err in rejecting Dr. Wilkinson's February 2010 opinions based on  
4 their very limited duration. An ALJ may reject an examining doctor's opinions when it  
5 does not address the claimant's long-term functioning. See *Carmickle v. Comm'r, Soc.*  
6 *Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008).

7 The ALJ's other reasons are erroneous, but are harmless. "[A]n error is harmless  
8 so long as there remains substantial evidence supporting the ALJ's decision and the  
9 error 'does not negate the validity of the ALJ's ultimate conclusion.'" See *Molina v.*  
10 *Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (quoting *Batson v. Comm'r of Soc. Sec.*  
11 *Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004)). Whether or not Dr. Wilkinson's opinions  
12 are inconsistent with the medical evidence does not change the fact that his opinions  
13 rendered in February 2010 were limited to a three-month period. The ALJ therefore did  
14 not harmfully err in rejecting these opinions.

15 *b. The ALJ Erred by Rejecting Dr. Wilkinson's November 2010*  
16 *Opinions, Citing Reasons Unsupported by Substantial Evidence*

17 Dr. Wilkinson examined plaintiff again in November 2010. See AR 615–25. Dr.  
18 Wilkinson again reported he did not review any medical records. AR 615. He opined  
19 plaintiff had moderate limitations in all areas of cognitive and social functioning. See AR  
20 618–19. Dr. Wilkinson opined plaintiff's limitations would last for six months. AR 618.

21 The ALJ rejected Dr. Wilkinson's November 2010 opinions because "even  
22 considering Dr. Wilkinson's [February 2010] opinion, Dr. Wilkinson only opined a total of  
23 nine months total for limitations, which is not fully consistent with the longitudinal record  
24 showing problems last for at least twelve months in duration during the period at issue."  
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1 See AR 24. The ALJ further rejected Dr. Wilkinson's opinions because he "did not  
2 review any collateral objective medical evidence prior to offering his November 2010  
3 opinions." *Id.*

4 The ALJ's first reason for rejecting Dr. Wilkinson's opinions fails because it does  
5 not establish what is inaccurate about the functional limitations stated. The ALJ  
6 essentially stated the overall record showed the limitations to which Dr. Wilkinson  
7 opined would last longer than the time Dr. Wilkinson opined. Rejecting the time  
8 limitation was not a specific and legitimate reason to discount the doctor's functional  
9 limitation opinions, because the ALJ did not have substantial evidence upon which to  
10 base this reason. Because the ALJ's explanation did not provide a supported reason for  
11 rejecting Dr. Wilkinson's November 2010 opinions regarding plaintiff's functioning, the  
12 ALJ erred.

13 The ALJ further erred in rejecting Dr. Wilkinson's November 2010 opinions on the  
14 basis that he failed to review any collateral objective medical evidence prior to offering  
15 his opinions. The ALJ has not identified what other evidence Dr. Wilkinson should have  
16 reviewed that may have undermined or contradicted his conclusions. See AR 24. The  
17 reviewing court is not required to "comb the administrative record" to find evidentiary  
18 conflicts. *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014). The ALJ therefore failed  
19 to give specific and legitimate reasons for rejecting Dr. Wilkinson's November 2010  
20 opinions. The ALJ thus harmfully erred in rejecting those opinions.

21 2. The ALJ Did Not Harmfully Err in Rejecting Dr. Washburn's Opinions

22 Dr. Washburn examined plaintiff in May 2010. See AR 607–14. Dr. Washburn  
23 reviewed Dr. Wilkinson's February 2010 exam, but did not review any other records. AR  
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1 607. Dr. Washburn opined plaintiff was markedly limited in his abilities to: Appropriately  
2 relate to coworkers and supervisors; appropriately respond to and tolerate the  
3 pressures of a normal work setting; and maintain appropriate behavior in such a setting.  
4 AR 610. Dr. Washburn opined these limitations would persist for six years. AR 611.

5 The ALJ rejected Dr. Washburn's opinions because they were not fully supported  
6 by or inconsistent with the overall medical evidence and Dr. Washburn's own findings.  
7 AR 23. The ALJ further reasoned Dr. Washburn performed only one brief exam, did not  
8 review any records other than Dr. Wilkinson's February 2010 opinions, and was not an  
9 expert in social security disability evaluations. *Id.*

10 The ALJ did not err in rejecting Dr. Washburn's opinions as not fully supported by  
11 his exam findings. An ALJ may discount a doctor's opinions when they are inconsistent  
12 with or unsupported by the doctor's own clinical findings. *See Tommasetti v. Astrue*, 533  
13 F.3d 1035, 1041 (9th Cir. 2008). As the ALJ noted, plaintiff demonstrated adequate  
14 abstract reasoning and fair practical judgment—as well as adequate auditory  
15 concentration, adequate ability to follow directions, and average intelligence—but Dr.  
16 Washburn opined plaintiff did not have adequate coping skills for employment. *See* AR  
17 23, 614. Absent an explanation from Dr. Washburn, the ALJ reasonably concluded  
18 plaintiff's relatively normal performance on exam did not support Dr. Washburn's  
19 opinions of marked limitations.

20 Much like the ALJ's analysis of Dr. Wilkinson's opinions, the ALJ's analysis of Dr.  
21 Washburn's opinions was not free from error, but those errors were harmless. *See*  
22 *Molina*, 674 F.3d at 1115. Dr. Washburn's opinions were not supported by his own  
23 exam findings regardless of the fact that, for example, the ALJ erroneously rejected Dr.

1 Washburn's opinions as based on a single exam. The ALJ therefore did not harmfully  
2 err in rejecting Dr. Washburn's opinions.

3 3. The ALJ Did Not Harmfully Err in Rejecting Dr. Widlan's Opinions

4 Dr. Widlan examined plaintiff in September 2014. See AR 626–37. Dr. Widlan  
5 noted he did not review any medical records as part of his examination. AR 626. Dr.  
6 Widlan opined plaintiff had marked limitations in his ability to adapt to changes in a  
7 routine work setting, communicate and perform effectively in a work setting, and  
8 complete a normal workday and week without interruptions from his psychologically  
9 based symptoms. AR 628. Dr. Widlan opined these limitations would last six to 12  
10 months. *Id.*

11 Dr. Widlan examined plaintiff again in June 2016. See AR 638–47. Dr. Widlan  
12 again reported he did not review any records, other than his own September 2014  
13 evaluation. AR 628. He opined plaintiff had the same marked limitations as he had in  
14 September 2014. See AR 640.

15 The ALJ rejected Dr. Widlan's opinions from both of his exams. See AR 24–25.  
16 The ALJ reasoned these opinions were inconsistent with the longitudinal evidence and  
17 Dr. Widlan's own exam findings. *Id.* The ALJ further reasoned Dr. Widlan's opinions  
18 were based on a one-time exam, and relied too heavily on plaintiff's self-reports. *Id.* The  
19 ALJ last rejected Dr. Widlan's opinions because he was not an expert in social security  
20 disability evaluations. *Id.*

21 The ALJ did not err in rejecting Dr. Widlan's opinions as not fully supported by his  
22 own exam findings. See *Tommasetti*, 533 F.3d at 1041. As with Dr. Washburn, the ALJ  
23 noted Dr. Widlan's findings on exam in 2014 and 2016 showed relatively normal  
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1 functioning, including normal memory, concentration, abstract reasoning. See AR 24,  
2 629–30, 641–42. Without some explanation from Dr. Widlan as to what else in his  
3 exams supported marked limitations, the ALJ reasonably concluded Dr. Widlan's  
4 opinions were inadequately supported by his own exam findings.

5 The ALJ's analysis was not free from error, but these errors were harmless. See  
6 *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). Dr. Widlan's opinions were not  
7 supported by his exam findings even though the ALJ erroneously rejected Dr. Widlan's  
8 opinions based on his alleged lack of expertise with social security disability  
9 evaluations. The ALJ therefore did not harmfully err in rejecting Dr. Widlan's opinions.

10 **C. Remand with Instructions for Further Proceedings**

11 Plaintiff asks the Court to remand this matter for further administrative  
12 proceedings. Dkt. # 10 at 15. "The decision whether to remand a case for additional  
13 evidence, or simply to award benefits[,] is within the discretion of the court." *Trevizo v.*  
14 *Berryhill*, 871 F.3d 664, 682 (9th Cir. 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226,  
15 1232 (9th Cir. 1987)). The Court agrees remand for further proceedings is the  
16 appropriate remedy.

17 On remand, the ALJ shall reevaluate plaintiff's testimony regarding the severity of  
18 his physical and mental symptoms, and reevaluate Dr. Wilkinson's November 2010  
19 opinions. The ALJ shall conduct all further proceedings necessary to reevaluate the  
20 disability determination in light of this opinion.

1 II. CONCLUSION

2 Based on the foregoing discussion, the Court finds the ALJ erred when he  
3 determined plaintiff to be not disabled. Defendant's decision to deny benefits therefore  
4 is REVERSED and this matter is REMANDED for further administrative proceedings.

5 Dated this 16th day of November, 2020.

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Theresa L. Fricke  
9 United States Magistrate Judge  
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